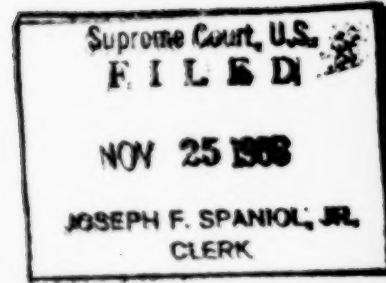


Case No. 85-1277



IN THE
**SUPREME COURT OF THE
UNITED STATES**

October Term, 1985

**THE SCHOOL BOARD OF NASSAU
COUNTY, FLORIDA; and CRAIG MARSH,**
*Individually and as Superintendent
of Schools of Nassau County, Florida,*
Petitioners,

---VS.---

GENE H. ARLINE,
Respondent.

**PETITIONERS REPLY BRIEF
ON THE MERITS**

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Pursuant to Rule 34.4, Supreme Court Rules, Petitioners reply to the Brief of Respondent.

STATEMENT OF THE CASE

It appears from the recitations in her *Statement of the Case* that Respondent and Petitioners differ as to the facts in the Record. Petitioners, therefore, strongly suggest that certain statements contained in Respondent's Brief, on pages two through ten, need to be addressed and carefully re-examined.

In her *Statement of the Case* at the beginning of the Brief, Respondent states that the "School Board fired her after learning she had tested positively for tuberculosis in 1977 and 1978". (See page 3 of Respondent's Brief) This is, of course, not true. She was terminated by the School Board on the recommendation of the Superintendent, after being suspended with pay. She was dismissed after the School Board held a hearing and heard the expert testimony of Dr. McEuen that she presented an unacceptable risk in teaching young children. (TT 81, 82) During the time between the suspension and dismissal she was receiving her full salary. (TT 82, line 6)

In her *Statement of the Case* (page 3) Respondent states that sometime after 1957 she was "cured". However, in her sworn testimony at trial (TT 76, line 21), the following questions and answers appear:

- Q. Now, you are presently, am I correct, forty-one years old, Mrs. Arline?
- A. Yes.

Q. How old were you when this condition was first diagnosed, tuberculosis?

A. I guess around fourteen.

Q. All right. And up until 1979, from age fourteen up until 1979 when -- I guess you would have been thirty-eight or so or thereabouts. Were you treated regularly for this disease?

A. Yes.

Q. Were you hospitalized?

A. In Tallahassee.

Q. Was that at the Sunland Center in Tallahassee?

A. Yes.

As to Mrs. Arline being "cured", it appears by her own testimony that she was treated regularly for twenty-four years since the disease was diagnosed. Further, as we now know from the medical evidence, tuberculosis, once contracted, is never cured but may be in a state of remission or control. The term "cured", therefore, is not appropriate for any person diagnosed as having contracted the disease. (See Petitioner's Brief, page 16)

An additional statement by Respondent in her Brief simply cannot pass without comment by Petitioners. At page 3, she states:

"Although it was a policy of the school board to assign teachers to classes outside of their field of certification, this alternative was not extended to Mrs. Arline because of her handicap. She was terminated outright (J.A. 56-57)."

This statement would have the Court believe that a

teacher holding a bachelor's degree in elementary education and certified as an elementary school teacher should simply be transferred to teach high school physics, French or American History, without any further certification or training. The statement is not borne out by the Record and defies common sense and sound education practices. The testimony of the Superintendent did not establish that the School Board allowed every certified teacher to teach in any possible open position. (J.A. 55-57) The Superintendent's testimony was that it was the state policy to place certified teachers in their appropriate field. The School Board did, through local option, allow persons without appropriate certification to go into a particular position or grade level depending on the particular circumstance and, if that person were working towards certification in that field. (J.A. 57) The testimony of Respondent clearly demonstrates she was not making nor had she made any effort towards certification in any area other than elementary education. (TT 70-72) Her lack of effort to expand her certification existed both before and after her termination as can be seen by her lack of effort between the time of her termination (1979) and the time of her trial testimony (1983).¹

Although perhaps not significant to the final determination of this controversy, Petitioners also note the emphasis placed by Respondent on the Board's not offering to her teaching positions that became open between the

¹A review of the state laws on teacher certification reveals that no state specifically allows a teacher with an elementary certificate to teach at the upper secondary levels without the appropriate endorsement or an approved minor in the subject matter to be taught. *Requirements for Certification*, The University of Chicago Press, 1984-85, Burks, Mary P.

dismissal hearing (May, 1979) and the trial in the District Court (November, 1983). (See Respondent's Brief, page 3) The Respondent was terminated and her contract of employment was lawfully cancelled in May, 1979. The dismissal was upheld by appropriate judicial review in the Florida courts. There was simply no obligation, Petitioners suggest, to extend Respondent additional positions after her dismissal.

ARGUMENT

POINT I

THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS DOES NOT CONSTITUTE A "HANDICAP" WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U. S. C. 794

A. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE STATUTE

The argument of Respondent does not address one of the key issues in this appeal. The issue which appears not to be argued is whether Respondent, under Section 504 and the regulations adopted to implement it, is "impaired and substantially limited" in one or more of her "major life activities". As has been set forth in earlier Briefs, 45 C.F.L. 84.3(j) provides that

" 'Major life activities' means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

Respondent addresses this issue by stating as follows:

"Dr. McEuen testified that the disease can limit a major life function, that it affects the respiratory system in general, and that it includes such symptoms as coughing, chest pain, weight loss, fever and night sweats (J.A. 6-7). The school board did not dispute this testimony."

Actually, what Dr. McEuen said was as follows:

"Q. And is it the kind of an illness which has the potential to limit a major life function such as breathing or walking or something such as that?

A. It could, yes." (J.A. 7)

The question, then, recurs as to whether or not her condition affected a "major life activity". Dr. McEuen stated that often there are no symptoms of tuberculosis so that an infected person could have the disease in a contagious form and have minimal or no symptoms whatsoever. (J.A. 6) This question is simply not answered by Respondent and the Briefs of *amici* have answered this inquiry with strained reasoning.²

Mrs. Arline taught elementary school for thirteen (13) years. There is no indication that she could not conduct her classes, personally supervise the spelling, mathematics and penmanship lessons of her students, fill out grade

²See, for instance, the Brief of the *State of California*, as *amicus curiae*, at pages 13 and 14 where the following appears:

"This purported exception ignores the plain language of the definition of 'handicapped individual.' A person who is in fact able to transmit a serious disease to others in some manner is 'substantially limited' through the inability to circulate freely among other people." (emphasis added)

books and otherwise do all of the tasks required of an elementary school teacher. Respondent's Brief, therefore, does not address the threshold of whether the disease of tuberculosis in the form suffered by Respondent is a "handicap" as defined by the Act and its regulations.

B. THE COURT OF APPEALS' DECISION IS CONTRARY TO EXPRESSIONS OF LEGISLATIVE INTENT

All parties agree that neither the language of the Act, the Congressional hearings nor the regulations make mention of tuberculosis or other contagious diseases. Much has been made of the exclusion of drug addicts and alcoholics by Respondent and various *amici*. (See page 19, Respondent's Brief) Petitioners' suggest, however, that it is not relevant nor does it assist the Court in resolving the difficulty created by Congress in enacting legislation which omits, intentionally or unintentionally, any reference to contagious diseases. Petitioners have noted that the H.H.S. analysis accompanying the regulations state that the term "physical or mental impairment" includes "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and...drug addiction and alcoholism." 45 C.F.R. Pt. 84, App. A at 297 (1983). None of the above are contagious diseases.

In her brief, Respondent places great emphasis on the

case of *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d at 644. In that case, however, the Court was concerned with the absence of any medical evidence to sustain the school board's position. This is not the factual setting in this case, however, since Petitioners only acted after and upon the direct advice of a physician specializing in tuberculosis.

The plain fact remains that Respondent had a long-standing history of tuberculosis and had three outbreaks of contagiousness within eighteen months prior to her discharge as testified to by independent medical experts and verified by medical records.³ Petitioners' conduct was not "discriminatory" under the Act.

C. THE SCHOOL BOARD DISMISSED RESPONDENT BASED ON HER CONTAGIOUSNESS AND NOT "SOLELY BY REASON OF * * * HANDICAP," WITHIN THE MEANING OF SECTION 504 OF THE FEDERAL REHABILITATION ACT

1. Joined by the Solicitor General, we argued in our opening brief that Respondent's claim that the school

³An excellent statement of the facts leading up to the dismissal is set forth in the case of *School Board of Nassau County, Florida v. Gene H. Arline*, Fla. App., 408 So.2d 706. At page 707 of that decision, the court stated:

"Appellee was hired by the School Board in 1966. In 1969 she obtained a continuing contract and currently teaches in an elementary school housing kindergarten through third grade. She had a history of tuberculosis beginning in 1957. She was given chemotherapy treatment from 1957 to 1960. No positive tuberculosis cultures were found during the eleven years thereafter. However, in 1977 she again had a positive tuberculosis culture and has continuously received chemotherapy treatment. Despite appellee's cooperation in a vigorous anti-tuberculosis program since 1977, she had positive tuberculosis cultures both in 1978 and 1979."

board violated Section 504 of the Rehabilitation Act should be dismissed because the school board did not relieve Respondent of her teaching "solely by reason of * * * handicap," within the meaning of that Act (29 U.S.C. 794). See Pet. Br. 14-28; U.S. Br. 10-23. The school board dismissed Respondent *solely* because of the public health risks posed by her contagiousness and not because of any actual handicap she may (or be perceived to) have now or to have had in the past.

Respondent and *amici* ignore the thrust of our and the Solicitor General's argument. The thrust of their arguments, unfortunately, seek to impede rather than aid the Court's consideration of what all acknowledge is a difficult question of statutory construction. To facilitate the Court's consideration of this case, therefore, we must first state what is our position and, perhaps even more important, what it is not.⁴

First, we of course agree that any individual who suffers (or is perceived to suffer) from physical or mental impairments that substantially limit the individual's major life activities is "handicapped," within the meaning of Section 504, including when the disease causing the impairment is itself contagious. Hence, contrary to the claims of Respondent and certain *amici*, no one in this case is denying that an individual who has infectious, contagious tuberculosis may be handicapped due to the actual (or perceived) physical effects of that disease now or in the past. See, e.g. U.S. Br. 12 ("An individual who is disabled with an infectious, contagious disease surely may be a

⁴This portion of the Petitioners' brief reflects consultation with the Solicitor General.

'handicapped individual' within the meaning of the Rehabilitation Act.") The merits of this case turn, however, not on that issue, but on a more subtle inquiry into the meaning of Section 504's prohibition on discrimination "solely by reason of * * * handicap," particularly the extent to which that prohibition restricts discrimination based on contagiousness. As discussed in our opening brief and below, it is our view that Section 504's prohibition has very limited application to discrimination based on contagiousness because contagiousness alone is not physically or mentally disabling and, accordingly, is not a handicap.

Second, we do not maintain (nor do we read the Solicitor General as suggesting) that discrimination on the basis of contagiousness can *never* constitute handicap discrimination within the meaning of Section 504. Discrimination on the basis of contagiousness plainly constitutes handicap discrimination when it is either a mere pretext for handicap discrimination or is rooted in a stereotypical judgment about the handicapped. Thus, Respondent and *amici* are flatly wrong in their repeated claims that our position reads out of Section 504's mandate the essential protection the Rehabilitation Act provides against discrimination based on pretext and false stereotypes.⁵ We assert only that under the circumstances

⁵See, e.g., Resp. Br. 27 ("would sanction discrimination against a wide range of handicapped individuals on the irrational basis of negative reaction to outward manifestations of handicapping impairments"); Amici Senator Craighton, et al., Br. 16 ("according to their reasoning, a handicapped person who was perfectly qualified for a job would be stripped of all Section 504 protection as long as the employer asserted a reason other than the physical or mental inability of the person to participate in a given program -- contagion, aversion, fear of increased medical or insurance expenses, superstition, or any other inaccurate but honestly held belief."); Amici Employment Law Center, et al., Br. 8 ("would allow discrimination based upon irrational stereotypes about handicapped persons because such stereotypes may concern matters other than the physical or mental effects of a particular handicap"); Amici American Public Health Ass'n, et al., Br. 27 ("Petitioners and the Department of Justice now seek * * * to block the applicability of Section 504 to certain conditions by declaring one element of some diseases, the possibility of communicability, to be a separate characteristic for which discrimination is never unlawful.").

of this case the school board's dismissal of Respondent did not violate Section 504 of the Rehabilitation Act because her dismissal was neither a mere pretext for handicap discrimination nor based on a stereotypical judgment about the handicapped.

For this same reason, contrary to the "parade of horrors" suggested by *amici* such as the American Public Health Ass'n (Br. 31-35), our reading of Section 504 would not sanction irrational discrimination by federal grantees against persons with contagious diseases. Section 504 restricts such discrimination when it is a mere pretext for handicap discrimination or based on a stereotypical judgment about the handicapped. Even more broadly, as stressed by the Solicitor General (U.S. Br. 11 n.7):

[A]lthough Section 504 may not forbid certain nonhandicap-based discrimination by recipients of federal financial assistance, such conduct may violate other federal or state laws more directly concerned with the particular program or activity at issue.⁶

Section 504 is designed to address one type of discrimination problem and should not be rewritten by the courts to deal with a distinctly different set of social concerns (see U.S. Br. 9-10). To be sure, Congress may choose to address the problem and may, as Respondent and *amici* propose, ultimately choose to impose the Section 504 non-discrimination model on the type of circumstances presented by this case. The decision, however, is for Congress, and not the courts, to make in the first instance.⁷

⁶Indeed, *amici* supporting respondent make just this point in suggesting that many state nondiscrimination laws might restrict determinations based on contagiousness. See e.g., Amici Employment Law Center, et al., Br. 14-18; Amici California, et al., Br. 26-27.

⁷As recent events testify, the balance will not necessarily be an easy one for Congress to strike. See Sacks, Brenner, Breeden, Anders & Parker, *Epidemiology of a Tuberculosis Outbreak in a South Carolina Junior High School*, 75 American J. Pub. Health 361 (1985) (describing spread of tuberculosis in junior high school).

2. Respondent and her supporting *amici* nonetheless urge on this Court two different extreme readings of Section 504, neither of which is tenable.

a. Under the first, advanced by Respondent and some of the *amici* (most notably the American Medical Association (AMA)), discrimination on the basis of contagiousness would *always* constitute handicap discrimination whenever the individual being discriminated against is (or is perceived to be) physically or mentally disabled by the contagious disease. Respondent and the AMA base their claim on the proposition that contagiousness is an inseparable part of an individual's handicap.⁸

This contention is fundamentally flawed, however, because contagiousness may exist wholly apart from any physical or mental disability and therefore contagiousness can not accurately be described as an inseparable part of a handicap.⁹ As the American Medical Association readily acknowledges (Br. 5),¹⁰ an individual may be contagious

⁸See e.g., Resp. Br. 27 ("The error of [the government's and petitioners'] position arises from * * * the segregation of a 'health condition' from the handicap itself."); Amici AMA, et al., Br. 24 ("[I]f a disease like tuberculosis substantially limits a person's major life activities, then tuberculosis is the impairment or handicap, including, but not limited to, the effects of that disease. In those circumstances, a federal fund recipient could not, therefore, discriminate against an individual 'solely on the basis of' the disease of tuberculosis 'including the effects of the disease on the victim and on third parties'"); Amici Senator Cranston, et al., Br. 12 (contagiousness "is an inherent characteristic of the handicap"); Amicus Epilepsy Foundation of America Br. 5 ("It is not possible to separate the effects of a disease from the disease itself."); Amici APHA, et al., Br. 29 (contagiousness is an "intrinsic element" of the disease.)

⁹See generally Mandell, Douglas & Bennett, *Principles and Practice of Infectious Diseases*, 110-111, 120-125 (1979).

¹⁰At trial, Dr. McEuen similarly testified that there are often no symptoms of tuberculosis, so that an infected person could have the disease in a contagious form and have minimal or no symptoms whatsoever (J.A. 6).

in respect to a serious, and sometimes disabling disease, such as tuberculosis, without being physically disabled by tuberculosis (or, conversely, an individual can be physically disabled by tuberculosis and not contagious). For this reason, as the AMA further appears to acknowledge (Br. 24-25 n.20),¹¹ discrimination on the basis of contagiousness is plainly not discrimination on the basis of a handicap, when the individual being discriminated against is not now and has not in the past been handicapped or perceived to be so.

Given that premise, we see no reason to suppose that discrimination on the basis of contagiousness is necessarily handicap discrimination just because the individual is also handicapped. Instead, like discrimination based on other human characteristics that may be possessed by both the handicapped and the non-handicapped alike, discrimination on the basis of contagiousness should constitute handicap discrimination only if one of two circumstances is established: (1) the non-handicap characteristic allegedly relied on -- in this case contagiousness -- is in reality a pretext designed to conceal the true motivation, which was handicap-based; or (2) the determination that the individual is contagious is rooted not in fact but in a

¹¹The AMA concludes that "[a] person who has no symptoms of a communicable disease but nonetheless carries it may not be handicapped within the statutory definition because being a pure carrier may not, depending on medical evaluations and legal judgments, significantly limit the carrier's major life activities" (AMA Br. 24-25 n.20). The AMA also argues that whether Respondent is handicapped in this case depends on the "nature, degree and duration of the impairment caused by the disease and then on a legal judgment whether that impairment is 'substantial'" (id. at 16). The AMA nowhere suggests that the contagiousness is itself a handicap, but instead suggests the possibility that "Respondent's respiratory functions may have been seriously affected" (id. at 17 n.11). Presumably, under the AMA's view, if it were established on remand that Respondent was not handicapped (or perceived to be handicapped), Respondent's Section 504 claim based on dismissal for contagiousness would fail.

stereotypical conclusion derived from a handicap. Neither Respondent nor any of its supporting *amici* nor the AMA which advance the "inseparability" theory come to grips with this problem.

b. The remaining *amici* supporting Respondent advance a different and even more extreme view of Section 504. They argue that contagiousness is itself a handicap and, consequently, discrimination on the basis of contagiousness is *always* handicap discrimination. In support of their contention that contagiousness is a handicap in its own right, the *amici* argue that contagiousness limits an individual's ability to engage in the major life activity of interacting with others.¹² Under this view, of course, even an immune carrier who did not suffer (and was not perceived as suffering) from any physical or mental disabilities from the disease could be the subject of handicap discrimination. Such a boundless view of "handicap" would lead to absurd results. It is no doubt for this reason that the AMA appears to have specifically rejected it (see AMA Br. 24-25 n.20; see note 7, *supra*). As explained by the Solicitor General:

[T]he fact that a contagious individual may be sharply restricted in his interactions with others, who are reluctant to deal with him, [does not] render contagiousness a handicap under Section 504. Section 504 is not intended to redress the full variety of human characteristics that may result in sharply restricted lives or in discriminatory treatment. It is only discrimination based on an actual or perceived handicap, and not all types of discrimination triggered by unfavorable societal attitudes toward a human characteristic, that is entitled to protection under the Rehabilitation. Otherwise, a host of personal characteristics that others might find offensive or even threatening -- ranging from personal hygiene

¹²See, e.g., *Amici Doctors for AIDS Research, et al.*, Br. 45 (asymptomatic carriers are handicapped because "[b]oth procreation and sexual intercourse are substantially limited for such individuals").

or appearance to a propensity for criminal or violent conduct -- would constitute handicaps. Section 504 would, in effect, ban discrimination based on any attitude that restrains the opportunities of each person to live a productive life. Whatever the merits of such a regime, it was plainly not enacted by Section 504.

U.S. Br. 20-21 (citation omitted); see also *id.* at 21 and nn. 18, 19.

c. In sum, the attack launched by Respondent, and others supporting *amici* against our view of Section 504, which is shared (we believe) by the Solicitor General, substitutes passion for careful and candid analysis, attacks a position not advanced by Petitioner, and virtually ignores the central *issue* presented by this case, which we discuss further below.

3. The dispositive inquiry in this case is whether the school board's dismissal of Respondent based on the board's concern about her contagiousness amounted to a stereotypical judgment about a handicap.¹³ We believe that the record is clear that it was not such a handicap-based judgment and, accordingly, Respondent's Section 504 claim should be dismissed.

In this case, we submit, the school board's decision was based solely upon the state public health official's report to the school board that Respondent had tested positive with respect to contagiousness and was an "unacceptable risk." Issues concerning respondent's physical

¹³The "stereotype" inquiry is the critical inquiry in this case because, as discussed above, contagiousness is not itself a handicap and the other possible ground for a Section 504 claim -- that the school board's concern with contagiousness was a mere pretext for handicap discrimination -- is not seriously advanced here. See U.S. Br. 21-22.

or mental abilities, including the relationship of her contagiousness to any handicap she might be suffering, played absolutely no role in the school board's determination.¹⁴

a. At the outset, the school board's decision clearly was not handicap-based because Respondent was neither handicapped nor perceived to be handicapped and, therefore, there was no handicap upon which the board could have based a stereotypical judgment about contagiousness. In other words, Respondent was the equivalent of the contagious, nonhandicapped immune carrier who, as even the AMA appears to acknowledge (Br. 24-25 n.20; see note 7 *supra*), cannot complain of handicap discrimination because any discrimination against the carrier based on his contagiousness necessarily lacks the statutorily-required nexus to a "physical" or "mental" "impairment".

b. In any event, even if Respondent were handicapped within the meaning of Section 504 (perhaps on the ground that she had a past history of being disabled by tuberculosis), the result is the same because the record leaves no doubt that Respondent was in all respects treated without regard to any physical handicap and, hence, like the AMA's "immune carrier." In making this submission, we fully appreciate that the judicial inquiry into whether a federal grantee's concern about contagiousness is handicap-based in a particular case should be exacting. While contagiousness may, like other human characteristics, be shared by both the handicapped and the

¹⁴Notably, there is no accusation that Respondent was singled out by the school board because of her "past record of tuberculosis, as found by the Eleventh Circuit.

nonhandicapped, it is not, unlike other such human characteristics, wholly unrelated to the handicap itself in those instances when the contagious individual is also handicapped by that same contagious disease (see U.S. Br. 19 & n.11). For this reason, there is legitimate cause for concern that a decision ostensibly based on contagiousness may in reality be just a stereotyped conclusion derived from the handicap itself. Accordingly, where the underlying illness does amount to a handicap, courts should carefully inquire to determine if the concern about contagiousness has a factual basis and is not simply an unsupported conclusion derived from the handicap itself.

POINT II

ONE WHO IS AFFLICTED WITH THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS IS PRECLUDED FROM BEING "OTHERWISE QUALIFIED" FOR THE JOB OF ELEMENTARY SCHOOL TEACHER, WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. 794

Respondent, at page 39 of her Brief, discusses the Board's duty to accommodate her, suggesting that the "program" at issue is the entire school system and that the Board should somehow find a job for her anywhere in the school system, in order to comply with the "reasonable accommodation" requirement of the Act. As previously set forth in this Reply Brief, the argument of Respondent (page 39-45, Respondent's Brief) presumes that a teacher certified to teach elementary education must be accommodated by furnishing that teacher a different position

in a different level simply because the teacher holds the generic professional title of "teacher". Certification laws and sound educational practices simply cannot be ignored upon facts such as these.

Further, there is no indication that even older students are not susceptible to becoming infected with tuberculosis. In fact, there appears to be some difference of opinion as to the issue of greater susceptibility even among the medical experts. The Respondent cannot be accommodated without endangering the health of others. Where, as here, medical experts may disagree as to the degrees of susceptibility, a school board must act to protect those endangered without the additional responsibility of distinguishing between those more or less susceptible students. This onerous task should not realistically be given to a lay school board especially in light of the divergence of opinion among medical experts regarding the susceptibility at different students or different stages of their early life.¹⁵

It is undisputed, however, that all persons are susceptible to tuberculosis infection upon contact with one carrying the disease. (J.A. 4-11)

CONCLUSION

There is insufficient evidence that a person suffering

¹⁵Dr. McEuen testified that young children were more susceptible than adolescents. However, other medical authorities disagree. The following appears at page 6 of the Brief of the American Medical Association, as *amicus curiae*:

"The risk of infection developing into the disease is highest in children under three years of age, lowest in later childhood, and *high again* in adolescents and young adults." (emphasis added) Comstock, Livesay & Woolpert, *The Prognosis of a Positive Tuberculin Reaction in Childhood and Adolescence*, 99 Am. J. Epidemiology 134 (1974).

from tuberculosis in the form suffered by Respondent is "impaired" in their major life activities. Further, there is no evidence in the Act that contagious diseases were specifically intended to be covered and included by Congress. The omission of this segment of medical infirmities by Congress simply should not be construed as a silent indication of coverage in the absence of clear, legislative mandate.

Notwithstanding the argument of Respondent, a program for reasonable accommodation of an elementary school teacher is simply not feasible unless it could be determined that her disease no longer exists in communicable form. If the disease no longer exists she is not "handicapped". School administrators cannot be expected to administer a medical clinic or to supervise weekly, daily or monthly testing of their employees. Assignment to a different position (science teacher, Latin teacher, school principal) involves an entirely different job with different duties but does not remove the risk of contagion unless accompanied by constant medical monitoring.

Respondent, by her own choosing, elected to limit her certification to elementary education. A reasonable requirement for elementary school teachers is that they, simply stated, be free of communicable disease. Respondent, therefore, is not "otherwise qualified" for the position of elementary school teacher as that term has been defined and implemented under and since the case of *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) and the record amply supports such a conclusion.

Respectfully Submitted

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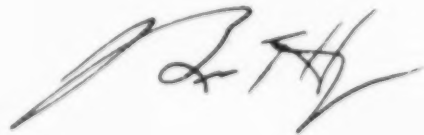
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioners Reply Brief was furnished by U. S. mail to George K. Radhert, Esquire, 233 Third Street North, St. Petersburg, Florida 33701, Attorney for the Respondent this 25th day of November, 1986.

A handwritten signature in black ink, appearing to be "L.H.", is written below the text of the certificate.